

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

AUG 5, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Trendmasters, Inc.  
v.  
Toymasters Incorporated

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Opposition No. 96,264  
to application Serial No. 74/396,789  
filed on June 1, 1993

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Cancellation No. 24,157

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Donald A. Kaul of Dorsey & Whitney for Trendmasters, Inc.  
Barbara S. McIntyre for Toymasters Incorporated.

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Before Simms, Quinn and Chapman, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

This consolidated case involves Trendmasters, Inc.'s  
(hereinafter "Trendmasters") opposition to an application  
filed by Toymasters Incorporated (hereinafter "Toymasters")  
and Trendmasters' petition for cancellation of a  
registration owned by Toymasters. The application is for

the mark TOYMASTERS for a variety of toys.<sup>1</sup> The registration is for the mark TOYMASTERS for designing and inventing toys, board games and play equipment for others.<sup>2</sup>

Both the notice of opposition and the petition for cancellation are based on priority and likelihood of confusion under Section 2(d) of the Trademark Act. Trendmasters owns two registrations for the marks TRENDMASTERS and TRENDMASTERS and design covering a wide range of toy items.

Toymasters, in its answers, denied the salient allegations of likelihood of confusion.<sup>3</sup>

The record in this consolidated proceeding consists of the pleadings; the files of the involved application and registration; the trial testimony of Brian Weinstock, Trendmasters' vice president for boys' product development, with related exhibits, taken by Trendmasters; and Toymasters' answers to Trendmasters' first set of interrogatories made of record by way of Trendmasters'

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<sup>1</sup> Application Serial No. 74/396,789, filed June 1, 1993, alleging dates of first use of July 1992.

<sup>2</sup> Registration No. 1,832,996, issued April 26, 1994, setting forth dates of first use of March 1993.

<sup>3</sup> Toymasters' answer to the notice of opposition is accompanied by a computerized printout of third-party registrations and applications. Trademark Rule 2.122(c) provides, in pertinent part, that an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period of the taking of testimony. Toymasters failed to properly introduce this evidence and, accordingly, it is not of record and has not been considered in reaching our decision. TBMP §705.01.

notice of reliance. Toymasters neither took any testimony nor introduced any other evidence.<sup>4</sup> Only Trendmasters filed a brief at final hearing.<sup>5</sup>

Trendmasters is in the business of creating and manufacturing toys, and is the largest privately-held toy company in the United States. Sales for a recent three-year period exceeded \$214 million, and advertising expenditures for a recent two-year period totaled \$21 million.

Trendmasters sells its toys to retailers such as K Mart, Toys R Us and Walmart, which in turn sell the toys to the ultimate consumer. Trendmasters has made thousands of different toys over the years and, according to Mr. Weinstock, each toy has carried the mark TRENDMASTER. Mr. Weinstock went on to add that the toys generally are branded with another mark which is a common practice in the toy industry. Trendmasters' toys have been promoted on television and in print media, and through catalogs and appearances at trade shows and toy fairs. Trendmasters maintains an Internet website which has been the subject of millions of hits.

Inasmuch as Toymasters did not take testimony or offer any evidence, the only information about it comes from the

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<sup>4</sup> Toymasters' notice of reliance on its registration sought to be canceled in this proceeding is superfluous inasmuch as the registration automatically forms part of the record pursuant to Trademark Rule 2.122(b)(1).

involved application and registration, and its answers to interrogatories. Toymasters apparently is a one-person operation with sales over a three-year period of less than \$9,000. From the discovery responses, it would appear that Toymasters has produced only one toy, namely a "stuffed electric battery powered ride-on motorhorse."

Before turning to the merits, the Board should point out that Toymasters' involved application also was the subject of Opposition No. 96,101 brought by a third party. In that proceeding, opposer Toymax, Inc. moved for summary judgment on its claim that Toymasters failed to use its mark in commerce. The Board, in a decision dated October 2, 1997, found that Toymasters had not used its mark in commerce as contemplated by the Trademark Act, and granted opposer's motion. Judgment was entered against applicant, the opposition was sustained and registration to applicant was refused.<sup>6</sup>

The Board, in the present consolidated proceeding, subsequently issued an order noting the above decision, and

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<sup>5</sup> Trendmasters' request to extend its time to file the brief is granted.

<sup>6</sup> Perhaps encouraged by this result, Trendmasters raised, for the first time in its appeal brief, a claim that applicant had failed to use its mark in commerce and, thus, that the involved application is void ab initio.

Suffice it to say that this claim was neither pleaded nor tried by the parties, but rather has been raised at a manifestly late juncture of the proceeding. Accordingly, no consideration has been given to this claim. See: *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715, 1717 at n. 5 (TTAB 1991).

advised the parties herein that a decision would issue in due course.

We now turn to the merits of this consolidated proceeding. Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. Federated Food, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

With respect to priority, opposer's ownership of valid and subsisting registrations establish its priority insofar as the opposition is concerned. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Further, with respect to both the opposition and cancellation, Mr. Weinstock's testimony establishes that Trendmasters' first use of its mark predates the earliest date of use upon which Toymasters is entitled to rely. David Crystal, Inc. v. Glamorise Foundation, Inc., 189 USPQ 740 (TTAB 1975); and Jean D'Albret v. Henkel-Khasana G.m.b.H., 185 USPQ 317 (TTAB 1975) [absent evidence, earliest date on which a defendant may rely is the filing

date of the opposed application or the filing date of the underlying application for a registration sought to be canceled].

In the present case, the goods are substantially similar or, at least in part, legally identical for purposes of our analysis. The goods would appear to be relatively inexpensive, off-the-shelf toys which are the subjects of impulse purchases. In addition, the goods move through the same channels of trade to the same classes of purchasers. Further, Trendmasters' toy items are related to Toymasters' services of designing and inventing toys. Moreover, the record indicates that Trendmasters has offered the same type of services as those identified in Toymasters' registration. In this connection, we note the following testimony of Mr. Weinstock:

First, we have on occasion been hired to design and invent toys for other companies. It's not a big part of our business; however, we do this from time to time. Second, we are continuously being asked by others to design and develop--inventing work. We almost always turn them down. But it's still clear that we are thought of for this type of service. Third, we go back to the similarity of the marks problem. Because the applicant's mark is so similar to ours, people are going to think that it's us doing business in the design work under the "Toymasters" mark.

Mr. Weinstock went on to identify two specific instances when Trendmasters did toy design work for others. In

mentioning Trendmasters' work in designing a line of electronic "Barney" toys for Hasbro, Mr. Weinstock stated that "[t]hey know we're good at designing, and they wanted us to do it for them."

From the above testimony, it would appear that, just as in the case with the goods, there is an identity (or substantial similarity) between the parties' services.

We now turn to compare the marks TRENDMASTERS and TOYMASTERS. We note at the outset that if the goods and/or services are identical, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Both marks begin with the letter "T", both have three syllables and both end in the word "MASTERS." The marks are similarly constructed and are somewhat similar in sound. There is no evidence of record showing any uses or registrations of similar marks in the toy field. On this point, Mr. Weinstock testified that his company is "the only significant toy company which uses the word 'masters' in its name" and, moreover, that he is not familiar with "any competitor toy company that uses a name beginning with the letter 'T' and including as any part of its name the word 'masters.'" Mr. Weinstock also believes that the likelihood

of confusion is enhanced by the fact that his company is "often referred to and are often called Trendmasters toys and Trendmasters toymakers."

We find that the marks TRENDMASTERS and TOYMASTERS are sufficiently similar in overall commercial impression that, when used in connection with identical or substantially similar goods and/or services, confusion is likely to occur. In finding likelihood of confusion, we have kept in mind the normal fallibility of human memory over time and the fact that consumers retain a general rather than a specific impression of trademarks encountered in the marketplace. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992).

Trendmasters claims that its mark is famous. Indeed, Trendmasters has enjoyed success with the toys sold under the mark TRENDMASTERS, and Trendmasters has undertaken significant promotional activities. Further, as noted above, the record is devoid of any properly introduced evidence of any third-party uses or registrations of similar marks in the toy industry. Although we are willing to accept Trendmasters' claim that its mark is strong in the field, we do not accord, however, the status of "famous mark" to the mark TRENDMASTERS based on the record presently before us. Cf. *Kenner Parker Toys v. Rose Art Industries*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).



The absence of any evidence of actual confusion is of little moment in deciding this case. Given Toymasters' extremely limited sales, there has been no meaningful opportunity for confusion to occur in the marketplace.

In sum, the relevant du Pont factors in Trendmasters' favor simply outweigh any differences in the marks. Finally, to the extent that these differences or any of the points raised by the dissent raise a doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior user. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 2 (CCPA 1977).

Decision: The opposition is sustained. The petition for cancellation is granted and the registration will be canceled in due course.

T. J. Quinn

B. A. Chapman  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board

Simms, Administrative Trademark Judge, dissenting:

I cannot join my colleagues because I do not believe that the marks TRENDMASTERS and TOYMASTERS, as used in

connection with toy designing and inventing services, are sufficiently similar in sound, appearance or meaning to cause confusion. First, I confine my comments to the cancellation proceeding wherein Trendmasters seeks to cancel Toymasters' registration for designing and inventing toys, board games and play equipment for others. This is because, in my view, the decision in Opposition No. 96,101 refusing registration of Toymasters' applied-for mark renders moot Trendmasters' claims herein against that application. Not only do I believe that the marks TRENDMASTERS and TOYMASTERS have different and distinct sounds, appearances and connotations, but also I believe that, with respect to these services, they are and would be offered to a relatively sophisticated class of purchasers (for example, a toy company such as Hasbro) that would necessarily know the source of the services offered under these different marks and thereby distinguish them.

R. L. Simms  
Administrative Trademark Judge